BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Sections of	)	MM Docket No. 92-266
the Cable Television Consumer	)	MM Docket No. 93-215
Protection and Competition	)	
Act of 1992: Rate Regulation	)	
	)	
Fifth Report and Order	)	

OPPOSITION OF QVC, INC.
TO PETITION FOR RECONSIDERATION
OF WEST MICHIGAN COMMUNITIES

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February 3, 1995

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QVC, Inc. ("QVC"), by its attorneys, respectfully files this Opposition to the Petition for Reconsideration filed in the above-captioned proceeding by West Michigan Communities ("West Michigan").[1]

INTRODUCTION AND SUMMARY

In the comments below, QVC demonstrates:

- Contrary to West Michigan's claim, the 1992 Cable Act does not "expressly require" or "unambiguously contemplate" a tier-based revenue offset approach;
- The Commission's clarification of its offset rule providing for a channel-by-channel approach did not require notice and comment, because such a clarification is specifically exempted from such formal procedural requirements by the "interpretive rule" exception of 5 U.S.C. § 553(b)(3)(A);

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[1] Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 and 93-215, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, FCC 94-286 (released November 18, 1994) ("Fifth Report and Order").

- An offset requirement is unnecessary for several reasons. However, if Commission believes it must retain an offset, a channel-by-channel approach is more consistent with the Commission's objectives, provided such a per-channel offset applies only against programming costs, and not against the $.20 markup recoverable under the new going-forward rules. Conversely, a tier-based approach would upset the well-established Commission policy objective of programmer neutrality by favoring advertiser-supported programming over home-shopping services.

In the end, West Michigan has asked the Commission to dramatically change its offsetting requirement based on little more than the apparent fact that cable systems in West Michigan's communities have added what West Michigan perceives to be too many home shopping services. This atypical set of facts should not be permitted to drive nationwide rules that would negatively affect the entire cable industry.

I. THE CABLE ACT DOES NOT REQUIRE TIER-BASED OFFSETTING.

West Michigan contends that § 3(b)(2)(C) of the 1992 Cable Act requires a tier-by-tier offset.[2] This argument misconstrues the statute.

Sections 3(b)(2)(C) and 3(c)(2)(F) of the 1992 Cable Act direct the Commission, in prescribing regulations to ensure the reasonableness of the rates for basic and cable programming services, to "take into account" or "consider" a number of factors, including the "revenues" and "other consideration" received by the operator in connection with the services for which rates are being established. The statute and its

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[2] West Michigan Petition at 5-6.

legislative history are silent, however, as to what specific form the Commission's consideration of such revenues should take. Rather, the Act confers broad discretion on the Commission to determine and consider the relevance of revenues and all other factors in developing its rate rules.[3] Thus, West Michigan's claim that a tier-based offset is "required" or "expressly contemplated" by the 1992 Cable Act is simply incorrect.

Moreover, the Commission has not established the "reasonableness" of cable rates by tier. The Commission's initial benchmark formula was based on a "per channel" rate.[4] The revised benchmark formula, adopted in the Second Reconsideration Order,[5] is based on a cable system's total regulated revenues per subscriber and an allocation of these revenues to each tier based, in part, on the number of channels on each tier.[6] Plainly, if the resultant rate is determined by individual channels, one part of the means of determining that rate -- offsetting -- can be done on an individual channel basis, as well.

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[3] See Conference Report at 62 ("The purpose of these changes is to give the Commission the authority to choose the best method of ensuring reasonable rates for the basic service tier and to encourage the Commission to simplify the regulatory process"); 1992 Cable Act § 3(c)(2) ("Commission shall consider, among other factors....") (emphasis added).

[4] See FCC Form 393, Worksheet 1, line 128; Worksheet 2, lines 210 and 230.

[5] 74 R.R.2d (P&F) 1077 (1994).

[6] See FCC Form 1200, Module D, line D7; Module E, line E7; Module I, line I7.

II. FORMAL NOTICE AND COMMENT WAS NOT REQUIRED PRIOR TO THE COMMISSION'S APPROPRIATE CLARIFICATION OF ITS OFFSET RULE.

West Michigan claims that in the Fifth Report and Order, the Commission "abruptly reversed" its offset rule and thereby violated the APA because it did so without prior notice and comment. However, because the Commission's specification of a channel-by-channel offset was merely a clarification of an ambiguous rule, notice and comment rulemaking was not required.

Contrary to West Michigan's claim, none of the Commission's initial offset rule, the explanatory section of the Rate Order, or the instructions to FCC Form 1210 "unambiguously required a tier-based adjustment to the maximum permitted rates."[7] Indeed, as a matter of interpretation, the rule itself and the explanatory text, with their consistent use of the singular form of "programmer" and their focus on the relationship between the "operator and the programmer,"[8] tend to show that the Commission intended a channel-by-channel offset. West Michigan attempts offhandedly to dismiss such a consistent (and inconvenient, for West Michigan's purposes) use of the singular form by suggesting an alternative meaning: "Even if one programmer is compensating the operator, the rule requires that revenues be used to offset

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[7] West Michigan Petition at 7.

[8] 47 C.F.R. § 76.922(d)(3)(x) ("revenues received by the operator from the programmer) (emphasis added); Rate Order, 8 FCC Rcd. 5631, n. 602 (1993) ("any revenue received from a programmer, or shared by the programmer and the operator, for carriage of signals be netted against costs for purposes of calculating whether there has been an increase or decrease in programming costs for the programmer") (emphasis added).

increased costs of programming on the tier."[9] However, neither this strained reading, nor West Michigan's exaggerated reliance on FCC Form 1210's use of the plural "programmers" imbues the Commission's offset requirement with the unequivocal tier-based focus that Michigan now seeks to ascribe to it. Simply put, at no time did the Commission "unambiguously require a tier-based adjustment." The only thing "unambiguous" about the initial offset rule was that it was unclear.

Predictably, such ambiguity triggered industry requests for clarification. In response to the letters of various programmers showing, among other things, that the offset rule was causing confusion in the programming marketplace,[10] the Commission clarified that its purposes "will be fully achieved if offset requirements are applied on a channel-by-channel basis."[11]

Such a clarification required neither the solicitation of comments from interested parties, nor the initiation of a notice and comment rulemaking.[12] Nor was a requirement for such a

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[9] West Michigan Petition at 7.

[10] See, e.g., Letter from Sue D. Blumenfeld, Esq. and Philip L. Verveer, Esq. to Alexandra M. Wilson, Acting Chief, Cable Services Bureau, April 28, 1994.

[11] Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau to Sue D. Blumenfeld, Esq. and Philip L. Verveer, Esq., May 6, 1994 at 2 ("QVC Clarification Letter"); Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau to Peter H. Feinberg, Esq., May 6, 1994, at 2 ("HSN Clarification Letter").

[12] See, e.g., Cal-Almond, Inc. v. U.S. Dept. of Agriculture, 14 F.3d 429, 447-48 (9th Cir. 1993) ("'[I]nterpretive' rules -- those which merely clarify or explain existing law or regulations' -- are exempt from [APA notice and (continued...)

formal rulemaking proceeding triggered by the Commission's mere repetition and codification of this otherwise valid clarification in the Fifth Report and Order.[13] Indeed, to find otherwise would virtually bring to a complete halt the Commission's Cable Act implementation duties, given the inevitable ambiguities and the need for clarification and amplification of the rules.

III. AN OFFSETTING REQUIREMENT IS UNNECESSARY, BUT IF THE COMMISSION RETAINS AN OFFSET, IT SHOULD PRESERVE ITS CHANNEL-BY-CHANNEL APPROACH.

For several reasons, an offset requirement is unnecessary. First, an offset is inconsistent with the Commission's approach to the regulation of rates -- requiring all cable systems to charge rates comparable to effectively competitive systems. The Commission, in establishing its benchmark scheme, did not consider the home-shopping revenues of the effectively competitive systems it studied. Home-shopping revenues properly were left out of the analytical process because competitive systems earn home shopping revenues in step with comparable non-competitive systems. In other words, the home shopping revenues received by a cable system -- whether competitive or non-competitive -- are equally irrelevant to the rates charged to subscribers and thus should not be subject to an offset

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[12](...continued)
comment] requirements") (citing, among other things, 5 U.S.C. § 553(b)(3)(A)); see also Sekula v. F.D.I.C., 39 F.3d 448, 457 (3rd Cir. 1994) (same).

[13] Fifth Report and Order at ¶ 74.

requirement.[14] The only time offsetting is necessary is when an individual operator-programmer negotiation is manipulated to artificially inflate programming costs in an attempt to improperly raise subscriber rates. QVC respectfully suggests that the Commission should police such activity through its evasion authority rather than through an unnecessary, burdensome, and overbroad offset requirement.

Second, as QVC noted in its Petition, the caps implemented by the new going-forward rules effectively eliminate incentives to artificially inflate operator costs. Accordingly, the imposition of any offset rule has lost much of its prior rationale, and need not, and should not, be applied to operators using the new rules.[15]

Finally, as QVC noted in its Petition, the administrative burdens imposed on operators, programmers, and regulators to comply with and monitor an offset requirement vastly outweigh the putative benefits to consumers.[16] The mere fact that the Commission has yet to confront many of the issues arising from the sheer mechanics of an offset is a testament to the unworkability of such a scheme.

Although, as demonstrated above, an offset requirement is both unnecessary and impracticable, if an offset is retained, a

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[14] The Commission apparently recognized this principle when it exempted advertiser revenues from the offset requirement.

[15] See QVC Petition at 9.

[16] See id. at 4-5 and n. 4.

channel-by-channel offset better comports with the Commission's overriding policy objectives than does a tier-based approach.[17]

A channel-by-channel offset more closely targets the Commission's intent to discourage operators from artificially inflating programming cost pass-throughs through programmer rebates or side payments.[18] Moreover, when applied properly, it "facilitate[s] the provision of useful home-shopping services to the public."[19]

Tier-based offsetting, by contrast, would disrupt the current relationship between cable operators and home-shopping services and would significantly, if not totally, eliminate the incentive to carry such services. Because advertiser revenues are exempt from offsetting,[20] a tier-based approach substantially favors advertiser-supported programming over home-shopping services, since the former's revenues would not trigger a

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[17] This will be the case only if the Commission grants QVC's Petition for Reconsideration and limits the channel-by-channel offset to an operator's programming costs, and does not require the offsetting of the $.20 markup. As QVC demonstrated in its Petition, a per-channel offset against the $.20 markup: (1) is unnecessary, since such markup (which represents the operator's network costs for adding the channel) is not subject to the manipulation that the offset seeks to curtail, see QVC Petition at 8; and (2) strongly disfavors home-shopping services, because revenues from sales commissions would be offset while those from advertising are exempt. See id. at 3-14. While QVC does not address the offset of the $.20 markup in this pleading, it reserves the right to respond, in the reply round, to all parties who file comments/oppositions to QVC's Petition.

[18] See QVC Clarification Letter at 2; HSN Clarification Letter at 2.

[19] QVC Clarification Letter at 2.

[20] See Rate Order at n. 602.

reduction of programming cost pass-throughs for the tier, while home-shopping revenues would. Indeed, under this scenario, as home-shopping sales commissions increase, the offset problem increases correspondingly.

In short, West Michigan's proposal to switch to a tier-based offset scheme would produce the very skewed operator incentives to carry certain services and disfavor others that West Michigan purportedly seeks to avoid. Such an approach would clearly violate the Commission's express commitment to preserve programmer neutrality,[21] and should therefore be rejected.

CONCLUSION

For the foregoing reasons, QVC respectfully urges the Commission to reject West Michigan's petition to replace the existing channel-by-channel offset rule with a tier-based rule.

Respectfully submitted,

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[21] See QVC Petition at 11-14.

CERTIFICATE OF SERVICE

I, Francis M. Buono, hereby certify that I have caused the foregoing "Opposition of QVC, Inc. to Petition for Reconsideration of West Michigan Communities" to be served this third day of February, 1995, by first class mail, postage prepaid, to each of the following individuals:

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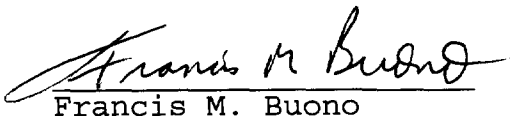

Francis M. Buono